Supreme Court of the United States

OCTOBER TERM, 1944

NO. 71.

ROSCOE A. COFFMAN, Appellant,

v.

BREEZE CORPORATIONS, INC., and THE UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the District of New Jersey.

NO. 485.

ROSCOE A. COFFMAN, Appellant,

v.

FEDERAL LABORATORIES, INC., and THE UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

In the brief for the United States (p. 18) it is suggested that if jurisdiction exists, nevertheless "the Court would remand the causes for hearing and determination of the constitutional issues, especially since these issues may require or justify the taking of evidence. Cf. *Wilshire Oil Co. v. United States*, 295 U. S. 100."

The case cited was one which was before this Court on a certificate of questions from a Circuit Court of Appeals. The appeal to the latter court was from an order of a District Court granting a preliminary injunction. The District Court had left to the hearing on the merits of this suit where they can be adequately and fully pre-

sented by the respective suitors" many matters disclosed by affidavits which had been filed: *United States v. Wilshire Oil Co.*, 9 F. Supp. 396, at p. 398.

No such situation exists in the case at bar, and it is merely gratuitous for the Government to suggest that the issues "may require or justify the taking of evidence." Under Section 1 of the Act of August 24, 1937, c. 754, 50 Stat. 751, 28 U.S.C. § 401, the United States was permitted "to intervene and become a party for presentation of evidence, * * * and argument upon the question of the constitutionality" of the Royalty Adjustment Act. No evidence was needed to determine the question as to the constitutionality of the Act, and the United States offered no evidence, though its counsel argued fully, both orally and by brief (not without protest), that the Act was constitutional. Why the brief was presented only to the court below and not to this Court, which postponed the hearing on jurisdiction "to the hearing of the case on the *merits*," we leave to the Department of Justice to try to explain.

If the question of jurisdiction is determined in favor of the appellant, we submit that he is entitled to the application of the rule "that where the law gives a party an appeal, he has a right to demand the conscientious judgment of the appellate court on every question arising in the cause": *Post v. Jones*, 19 How. 150, at p. 156.

We submit that this Court, having before it in the record everything necessary for judgment, "should proceed to do what the District Court ought to have done" (*City and County of Denver v. Denver Union Water Co.*, 246 U. S. 178, at p. 182), "thus saving to both parties the needless expense of a further prosecution of the suit"

(*Smith v. Vulcan Iron Works*, 165 U. S. 518, at p. 524). See also *Forged Steel Wheel Co. v. Lewellyn*, 251 U. S. 511, at pp. 515-516; *Davis v. Wallace*, 257 U. S. 478, at p. 482; *Hill v. Wallace*, 259 U. S. 44, at p. 63; *North Carolina R. R. Co. v. Story*, 268 U. S. 288, at p. 292; *Waggoner Estate v. Wichita County*, 273 U. S. 113, at p. 116; *Sterling v. Constantin*, 287 U. S. 378, at pp. 393-394.

The case of *Hill v. Wallace, supra*, is of particular interest, because the Court, after determining that there was equity in the bill against the Board of Trade of Chicago and the Secretary of Agriculture (for want of which the District Court had ordered that the bill be dismissed), proceeded to a determination of the merits and held an Act of Congress unconstitutional.

To these authorities we may add another reference to Section 3 of the Act under which the United States intervened, giving to the direct appeal to this Court, after the entry of a judgment either granting or denying an injunction, precedence over all other matters of a like character (Brief for Appellant, pp. 33-34). We submit that the purpose of this Act may best be attained by a final determination as to the constitutionality of the Royalty Adjustment Act and, if it is determined to be unconstitutional, by an injunction against the expropriation of the appellant's right to royalties, or any part thereof, on the ground that the purpose and effect of the Royalty Adjustment Act are to deprive the appellant of his contract right to these royalties without just compensation and without due process of law. A closely analogous case is *In re Manderson*, 51 Fed. 501 (C.C.A., 3rd Circ.). In this case the court affirmed a judgment dismissing a petition for the condemnation of land under a statute providing that the title should be vested in the

United States without charge. The court said by Wales, Dist. J. (p. 503):

> "Article 5 of amendments to the constitution of the United States prohibits the taking of private property for public use without just compensation. If the use for which it is proposed to take such property is not a public use, or if the owner of the property is not to be paid an *equivalent*, to be lawfully ascertained, for its loss, then no proceedings for condemnation can or should be allowed." (Italics ours.)

We are confident that the decision of the Court as to the need for an injunction will not be influenced by the introduction into the Brief for the United States of allegations of facts *dehors* the record. See particularly note 20 on page 34 of that brief and Appendix C, quoting letters to counsel for the United States and Breeze Corporations, Inc., from the Chairman of the Royalty Adjustment Board written while the instant cases were pending on appeal. Counsel must have known that these matters not in the record could not be taken into consideration. See *Schley v. Pullman Car Co.*, 120 U. S. 575, at p. 578; and *cf. Mitchell v. United States*, 9 Pet. 711, at p. 731; *Pacific R. R. of Missouri v. Ketchum*, 95 U. S. 1, at p 3; *South Carolina v. Wesley*, 155 U. S. 542, at p. 544. It is hardly necessary to add that the arrangement discussed between counsel and the Chairman of the Royalty Adjustment Board resembles in no way the condition of the injunctions set forth in *Kingan & Co. v. Smith*, 12 F. Supp. 329, at p. 331, cited in the note mentioned as adopting "a similar procedure." A court may protect parties by an injunction, but the Chairman of the Royalty Adjustment Board can give no protection against the terms

of the orders of the War Department and the Navy Department involved in this case; and if he wished to give such protection, he would endeavor to procure changes in the orders and not merely write letters to representatives of parties adverse to the appellant.

Respectfully submitted,

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